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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN WILLIAMS,

Defendant and Appellant.

B290824

(Los Angeles County
Super. Ct. No. TA124662)

APPEAL from an order of the Superior Court of Los Angeles County. William C. Ryan, Judge. Dismissed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * * * *

Appointed counsel for defendant and appellant Melvin Williams filed a brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) asking this court to review the record and determine if any colorable appellate issues exist. Defendant was advised of his right to file a supplemental brief and did not do so. Having concluded upon our review that defendant appealed from a nonappealable order, we dismiss the appeal.

BACKGROUND

In June 2013, defendant was charged by consolidated amended information with 10 counts arising from two different incidents in which defendant assaulted his girlfriend and her brother: corporal injury to a cohabitant (Pen. Code, § 273.5, subd. (a) [count 1]); assault by means likely to produce great bodily injury (§ 245, subd. (a)(4) [count 2]); criminal threats (§ 422, subd. (a) [count 3]); two counts of attempted premeditated murder (§§ 664, 187, subd. (a) [counts 4 & 5]); possession of a firearm by a felon (§ 29800, subd. (a)(1) [count 6]); contempt of court (§ 166, subd. (c)(1) [count 7]); first degree burglary (§ 459 [count 8]); and two counts of assault with a firearm (§ 245, subd. (a)(2) [counts 9 & 10]). Firearm use allegations were stated with respect to counts 4, 5, 8, 9 and 10 (§ 12022.53, subds. (b), (c), § 12022.5, subd. (b)). It was further alleged as to all counts, except count 7, that defendant had suffered a prior conviction for a serious or violent felony within the meaning of the Three Strikes law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) Defendant pled not guilty and denied the special allegations.

The case proceeded to a jury trial in the fall of 2013. The jury found defendant guilty on all 10 counts, and found the special allegations true, except that the jury was unable to reach a verdict on the allegation that defendant personally discharged a

firearm in the commission of counts 4 and 5 within the meaning of Penal Code section 12022.53, subdivision (c). The personal use allegations pursuant to subdivision (b) however were found true. The court found defendant's prior felony conviction for assault qualified as a strike for sentencing purposes and denied the defense motion to strike the prior pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The court sentenced defendant to an aggregate sentence of 48 years to life, plus an eight-year determinate term. The court imposed consecutive terms of 14 years to life on each of the attempted murder counts (counts 4 & 5), in addition to consecutive 10-year terms for the firearm use allegations pursuant to Penal Code section 12022.53, subdivision (b). The court imposed a consecutive four-year upper term on count 1 (corporal injury on a cohabitant, doubled due to the strike), and a concurrent one-year term on count 7. As to all other counts, the court imposed and stayed sentences pursuant to section 654. The stayed sentences included 10-year terms pursuant to section 12022.5, subdivision (b), as to counts 8, 9 and 10.

Defendant timely appealed from his conviction. On May 8, 2015, in an unpublished opinion, we affirmed defendant's conviction. (*People v. Williams* (May 8, 2015, B252994) [nonpub.].) Defendant's petition for review to the Supreme Court was denied on August 12, 2015 (S227129).

On April 9, 2018, almost three years after defendant began serving his sentence, he filed, in propria persona, a verified "Request for Stay of Gun Enhancement." Defendant requested "to be resentenced" in light of the passage of Senate Bill No. 620.

The superior court treated defendant's verified motion as a petition for writ of habeas corpus and, on May 14, 2018, denied

the request on the grounds defendant's conviction was final long before the passage of Senate Bill No. 620.

Defendant filed a notice of appeal on May 30, 2018, purporting to appeal from the court's order denying his motion.

DISCUSSION

“ ‘[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun. [Citations.]’ [Citation.] There are few exceptions to the rule. [¶] [Penal Code] [s]ection 1170, subdivision (d), provides, in relevant part, that a trial court may recall the sentence on its own motion within 120 days after committing a defendant to prison. [Citation.] Section 1170, subdivision (d), does not authorize a defendant to file a motion to recall the sentence. [Citation.] [¶] A trial court may correct a clerical error, but not a judicial error, at any time.” (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204-1205 (*Turrin*).) And, “an unauthorized sentence may be corrected at any time.” (*Id.* at p. 1205.)

None of the exceptions is applicable here. Plainly, the first exception does not apply, as this was a request initiated by defendant, not the trial court. Further, defendant's request is not based on an alleged clerical error in the rendition of judgment, nor any contention that the sentence was legally unauthorized when imposed. Defendant sought only the benefit of a statute that was passed some two years after his conviction became final in 2015.

Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect on January 1, 2018. As relevant here, the legislation amended Penal Code section 12022.53 and section 12022.5, restoring the discretion of trial courts to strike the gun use enhancements under these statutes. (Stats. 2017, ch. 682, §§ 1 & 2.) This newly

granted sentencing discretion may be exercised as to any defendant *whose conviction is not final as of the effective date of the amendment*. (*In re Estrada* (1965) 63 Cal.2d 740, 742-748; see also *People v. Brown* (2012) 54 Cal.4th 314, 323 and *People v. Vieira* (2005) 35 Cal.4th 264, 305 [“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”].) “A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired.” (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.)

Accordingly, the trial court was without jurisdiction to resentence defendant. Because the trial court was without jurisdiction to grant defendant the relief he sought, the order denying his motion did not affect his substantial rights within the meaning of Penal Code section 1237, subdivision (b). (See, e.g., *Turrin, supra*, 176 Cal.App.4th at p. 1208 [because trial court lacked jurisdiction to modify restitution fines, its “order denying [the] defendant’s motion requesting the same did not affect his substantial rights and [was] not an appealable postjudgment order”]; accord, *People v. Littlefield* (2018) 24 Cal.App.5th 1086, 1092 and *People v. Mendez* (2012) 209 Cal.App.4th 32, 34.)

Finally, we note the superior court treated defendant’s verified motion as a petition for writ of habeas corpus. Assuming defendant’s motion was properly so treated, defendant had no right to appeal from the denial. (*People v. Garrett* (1998) 67 Cal.App.4th 1419, 1420; 6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Writs, § 100, p. 719.) Defendant’s remedy was to file a new petition for habeas corpus in this court. (6 Witkin & Epstein, *supra*, Criminal Appeal, § 72, p. 348.)

However, even had defendant done so, as we already explained above, defendant was not entitled to be resentenced. (*In re Estrada, supra*, 63 Cal.2d at pp. 742-748.)

DISPOSITION

The appeal is dismissed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.